No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,

Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for the Southern District of California, Central Division. Honorable Ernest A. Tolin, Judge.

PETITION OF APPELLEE FOR REHEARING.

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To the Honorable Albert Lee Stephens and James Alger Fee, Circuit Judges, and the Honorable John Wiig, District Judge, of the United States Court of Appeals for the Ninth Circuit.

Appellee, Modern-Aire of Hollywood, Inc., a corporation, respectfully petitions this Honorable Court for a rehearing in this cause upon the following ground:

That this Honorable Court has erroneously held, as a matter of law, that there is no sufficient basis for the allowance of damages in favor of Appellee for loss of anticipated profits.

Preliminary Statement.

Appellee earnestly submits that the judgment of the Court adjudging that there is no sufficient basis for the allowance of damages for loss of anticipated profits is improper and against the law properly applicable to the facts in this cause. The judgment of the Court in this respect was predicated upon the fact that as Appellee's previous business experience was not shown to have been a profitable one, there was no basis upon which any reasonable calculation of damages could be made.

Appellee respectfully suggests that this Honorable Court has applied principles of law not properly applicable to the pertinent facts. These facts are the following:

(a) There had been awarded to the Appellee, by the United States Government, a written and properly executed contract pursuant to the terms of which the Appellee would have been paid the sum of $70,725.98 [Pltf. Ex. 12] upon performance of the contract.

(b) Appellee had submitted to the United States Government, in accordance with standard and required procedure, a proposal pursuant to which the Appellee set forth its estimated costs of production of the ordnance materiel provided for in the contract. [Deft. Ex. CC; T. R. pp. 192-194.] The cost of production would have been $66,304.38.

I.

The Proper Measure of Damages Was the Difference Between the Cost to Appellee of Production of the Goods ($66,304.38) and the Price Which the Appellee Was Entitled to Receive From the United States Government Upon Completed Performance of the Contract, to-wit, the Sum of $70,725.98.

It is submitted that whether the Appellee had in fact underestimated its costs of production was and is of no consequence in a determination of the measure of damages properly applicable. Its cost of production was obviously the basis upon which it received an award of a contract from the United States Government. Under no circumstances could Appellee have demanded more than $70,725.98 upon full performance of the contract. If in fact there had been performance under the contract, and if such performance had caused Appellee to incur costs of production in excess of $66,304.38, this would have been Appellee's loss; it could not have properly complained to the Government respecting its errors in calculation. Nevertheless, it would have been entitled to payment of the sum provided to be paid under the contract. By the same token, these matters were of no concern to the Appellant. The cost of the goods which Appellant had agreed to deliver was fixed; it was only one item of costs which Appellee considered in its negotiations with the United States Government. Its failure and refusal to deliver the goods which it was obligated to deliver made it impossible for the Appellee to perform under its contract with the Government. The Appellant well knew

that these goods were being purchased for use in a resale contract; the record is filled with admissions of such knowledge. [T. R. pp. 449, 544, 554-555, 562-563, 623-624, 627, 356, 376-377, 296, 672-673.]

It was thus clearly *within the knowledge and contemplation of the parties* that a breach of the agreement by the Appellant would cause the Appellee to sustain the loss represented by Appellee's inability to perform under the terms of a contract pursuant to which it would have received $70,725.98. (Emphasis added.)

The rule applied by the Court with respect to damages is applicable only where no such circumstances as were here present were within the contemplation of the parties.

The law is clear in California that profits lost as the direct and natural result of a breach of contract are recoverable as damages.

Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 249;

Beatty v. Oakland Sheet Metal Co., 111 Cal. App. 2d 53, 67;

Morello v. Growers Grape Production Association, 82 Cal. App. 2d 365, 375.

Appellee has set forth in its opening brief authorities in this jurisdiction as well as in other jurisdictions supporting the following proposition:

That where there are special circumstances made known to a seller at or before the making of a contract, from which it might reasonably have been foreseen that nondelivery by the seller will, in turn, cause a breach of

the buyer's contract with a customer, and the two contracts are in fact breached, the damages recoverable from the seller who is in default are the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated.

House Grain Co. v. Finerman, 116 Cal. App. 2d 483, 495, 497;

Patty v. Berryman, supra, 95 Cal. App. 2d 159 at p. 171;

Hacker etc. Co. v. Chapman Co., 17 Cal. App. 2d 265, 267-268.

The rationale of these cases is that by reason of the knowledge of special circumstances, the parties are deemed to have contracted on the terms of a seller's being liable if the seller forces the purchaser to a breach of the latter's contract with a customer.

See:

Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85.

Accord:

Booth v. Spuyten Mill Co., 60 N. Y. 487, 494;

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543.

As stated in the leading case of *Mesmore v. New York Shot and Lead Co.,* 40 N. Y. 422, the existence of the knowledge of a contract of resale brings the entire matter into the contemplation of the parties. Thus the case is within the general rule of damages as expressed in Section 3300 of the Civil Code of California.

This Honorable Court has supported this very proposition in the case of *Bercut v. Park Benziger & Co.,* 150 F. 2d 731, 733, wherein appears the following language:

> "In these California decisions the buyer's loss of profits appears to be regarded as the direct and natural consequences following in the ordinary course of events from the seller's failure to deliver . . ."

See:

Orester v. Dayton Rubber Manufacturing Co., 228 N. Y. 134, 126 N. E. 510.

Conclusion.

Counsel are humbly confident that upon a reconsideration of the record and briefs, this Honorable Court will grant a rehearing with respect to the issue upon which this Petition is based. The judgment of the Court, if carried to its logical conclusion and application, imposes upon every entrepeneur an unreasonable business risk. It says to such person:

> "When you enter into a new business every person with whom you deal may enter into a contract with you with impunity; if such person violates that contract you have no recourse for you have not been in business a sufficient time to have demonstrated your acumen and ability as being at a degree or level that will insure the profitable operation of your business."

Counsel feel that the Court did not intend such a result. The right to rely upon the performance of contractual duties should be as assured to the fledgling as it is to the aging. The enforceability of contracts should not be a matter of progression.

Appellee thus respectfully prays that this Petition for Rehearing be granted and that this case be reheard *en banc*.

Respectfully submitted,

AARON L. LINCOFF and
GILBERT KLEIN,
By AARON L. LINCOFF,
Attorneys for Petitioning Appellee.

Certificate.

I, Aaron L. Lincoff, one of counsel for the Appellee, Modern-Aire of Hollywood, Inc., a corporation, do hereby certify to this Honorable Court that in my judgment the foregoing Petition for Rehearing is well founded in fact and in law, and that it is not interposed for the purpose of delay.

Dated this 15th day of December, 1955.

AARON L. LINCOFF.